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Supreme Court, U.S.
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No. 97-594

In The

Supreme Court of the United States

October Term, 1997

UNISYS CORPORATION,

Petitioner,

vs.

CESKA SPORITELNA, a.s.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a corporate defendant's petition to compel arbitration pursuant to the Federal Arbitration Act was properly denied where both parties admitted, and the district court found, that "there was no agreement between . . . [the parties] to submit this dispute to arbitration."

RULE 29.6 STATEMENT

Nonwholly owned subsidiaries of respondent Ceska Sporitelna, a.s. (companies in which the respondent owns less than 100% but more than 50% of the stock) are as follows:

CS-stavebni sporitelna, a.s.

SPF, a.s.

CS-Zivn. Pojistovna., a.s.

SINDAT CS Consulting, a.s.

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STATEMENT OF THE CASE

This Petition seeks review of a Pennsylvania district court's decision to deny a defendant's motion to compel arbitration where the defendant admitted, and the district court found, that the parties had no agreement to arbitrate. *See* Appendix to Petition at 10a ("Since . . . there was no agreement between CS and Unisys to submit this dispute to arbitration, the petition of Unisys to compel arbitration must be denied.") (district court opinion).

The Third Circuit affirmed the district court's decision in a judgment order which adopted the district court opinion, and both courts relied on this Court's recent decision in *First Options of Chicago v. Kaplan*, 514 U.S. 938 (1995), which held that:

> the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute . . . arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes — but only those disputes — that the parties have agreed to submit to arbitration.

514 U.S. at 943. *See* Appendix to Petition at 6a-7a, 10a, 19a (discussion of *First Options* in district court opinion).

Inexplicably, the Petition does not address or even cite *First Options*, even though both parties discussed the case at length in their briefs to the Third Circuit, and clearly recognized its applicability here. The Petition also fails to point out that the defendant had the opportunity to enter into an arbitration agreement with the plaintiff, and consciously chose not to do so. *Id.* at 10a ("if Unisys 'wanted to be able to invoke the arbitration . . . clause(s), (it) should have directed (BV) to include appropriate language in (those) agreements' ") (district court opinion).

Instead, the Petition misstates the facts of this case, and then argues, based almost exclusively on distinguishable cases that pre-date *First Options*, that the decision of the district court in the action below should be reexamined. This argument is not persuasive, and the Petition should be denied.

A. The Petition Wrongfully Imputes Improper Motive To The Plaintiff.

The Petitioner repeatedly describes the issue in this Petition as whether the plaintiff in the court below, Ceska Sporitelna, a.s. ("CS"), can "avoid" arbitration by suing the Petitioner for fraud. *See* Petition at i, 5, 9. There is no evidence in the record that CS is trying to "avoid" anything, however. In fact, in demanding arbitration when it never agreed to arbitrate, it is the Petitioner that is attempting to "avoid" the consequences of its own actions — through which it carefully insulated itself from any obligation to arbitrate with CS.

In this regard, it is undisputed that the Petitioner: (i) avoided entering into contracts with CS; (ii) maintained its position as an entity separate and apart from the various European affiliates that did enter into contracts with CS; and (iii) expressly required, when it issued a "guarantee" of one of those contracts, that any claims against it under that "guarantee" be decided in court in the U.K., not in arbitration. These facts reveal that until the evidence of its fraud was uncovered, and an appropriate action filed against it, the Petitioner had no interest whatever in participating in an arbitration with CS, and would not agree to do so.

On this point, footnote 1 on page 5 of the Petition is mistaken in suggesting that language in the Unisys "guarantee" did not influence the decision of the courts below, because at oral argument, the Third Circuit panel challenged Petitioner's counsel

by specifically referring to the point made in CS's brief that Unisys' intent *not* to arbitrate anything "was evidenced by the language in its English law guarantee" which "specifically stated that disputes as to Unisys' guarantee obligations would be resolved judicially, not in arbitration." This language, and the absence of any agreement to arbitrate between the parties, clearly was important to the decisions below.

The Petitioner also argues that "the selection of Unisys as a defendant was a tactical decision intended to avoid the contractual arbitration mechanism," Petition at 6, but again, there is no support for this claim. Moreover, it wrongly presumes that there is no basis for an independent fraud claim against Unisys. In fact, the evidence of such fraud is overwhelming, and as the district court recognized, the fraud in question was committed by Unisys, not its "European affiliates":

> it does appear that an entire series of misrepresentations were made orally and in writing to CS's entire board of Directors by six of Unisys' representatives, including its Chairman and CEO, at Unisys' corporate headquarters in Blue Bell, Pennsylvania on January 12, 1994.

Appendix to Petition at 17a (district court opinion). Under these circumstances, the Petition's attempt to impute improper motive to the plaintiff CS is ill-founded.

B. The Petition Repeatedly Makes Factual Assertions That Are Not Supported By The Record And Are Disputed In The Proceeding Below.

The facts of this case are not correctly stated in the Petition, and many important facts are omitted from the Petition.

First, the action below against Unisys is not merely "for alleged misrepresentations regarding its subsidiary's ability to deliver the computer system," as the Petition states at page 5. Rather, it is for a series of independent fraudulent acts which included: (i) misrepresenting in writing the characteristics of a specific retail banking system; (ii) misleading CS into making an early determination to select that system as the one most suitable for its use; (iii) persuading CS not to terminate its efforts to install that system when the inherent problems with it began to appear; and (iv) fraudulently concealing those problems, which were known to Unisys, throughout its dealings with CS — which extended over almost four years.

Second, the Petition is inaccurate in claiming, at page 6, that

> [t]he fraud claim against Unisys is distinguished from a breach of contract claim against BV solely by the identity of the defendant, and the allegation that the alleged inability to perform was known to Unisys prior to the execution of the relevant contracts.

In fact, the fraud claim against Unisys is completely independent of any contract claim against BV, and it deals with sharply distiguishable issues. The district court recognized this fact in its opinion. *See* Appendix to Petition at 12a ("[a]ny verdict against Unisys on CS's fraud claim will be separate and distinct from any arbitration award CS may obtain against Unisys' subsidiaries").

Third, the claim in the Petition that CS entered into two contracts with a European affiliate of Unisys, and that "[i]n both agreements, CS agreed to arbitration as the mechanism for resolving disputes arising out of its purchase of the computer system," Petition at 5, is inaccurate and misleading. In fact,

during the period 1991-1995, CS entered into five (5) different contracts with two (2) different European affiliates of Unisys in connection with its procurement of what Unisys had represented to it as a proven and tested retail banking system. Only three (3) of those contracts (including the two identified in the Petition) contained arbitration clauses, and each clause was substantively narrow, procedurally specific, and strictly limited to particular types of disputes between CS and the European parties. The Petitioner was not a party to any of those contracts.

Fourth, the suggestion at page 5 of the Petition that "system design changes . . . requested by CS" prompted the execution of a new contract in 1994 is inaccurate, as is the claim that "[t]wo mainframe computers worth approximately $70 million, were delivered to CS early in the project and are still in use today." In fact, the 1994 contract was prompted by failures in the Unisys retail banking system, and the mainframe computers from Unisys had little if any value because the software that was supposed to enable them to operate a fully integrated retail banking system did not work. Similarly, the claim that "a significant portion of the software deliveries under the contract were made, and are still in use at the bank today," Petition at 5, is inaccurate. The most critical software deliveries were never made, and the defect-ridden software that was delivered initially had to be significantly modified to function at all.

Finally, the claim at page 6 of the Petition that "many of the alleged misrepresentations in the Complaint were made by employees and officials of Unisys subsidiaries other than the parent Unisys" is inaccurate and disputed in the proceeding below. In fact, most of the misrepresentations by Unisys that are alleged were made in writing in documents that clearly identified Unisys Corporation as the speaker. Thus, it is not the case, as the Petition claims at page 6, that "[t]he alleged misrepresentations amount to little more than alleged oral

statements of the representations made by BV in the contract." In fact, most of the Petitioner's misrepresentations were in writing, and many of them pre-date any contract between CS and the Unisys affiliate BV.

C. The Petition Mischaracterizes the District Court's Holding.

The Petitioner claims that the district court rejected its argument based purely on an interpretation of the Third Circuit's decision in *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287 (3d Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 583 (1996), and the Petition selectively quotes from the district court's discussion of *Dayhoff* to support this claim. *See* Petition at 7.

In fact, however, the district court also relied directly on this Court's decision in *First Options of Chicago v. Kaplan*, *supra*, and the fact that as a matter of law, the Federal Arbitration Act upholds a *contract* theory of arbitration, not a "relatedness" or "involvement" theory, and in order for one party to compel another to arbitrate, those two parties must have an agreement to arbitrate. Here, the district court found that there was none.

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS ALREADY ANSWERED THE QUESTION PRESENTED IN THIS CASE, AND THE THIRD CIRCUIT'S DECISION WAS PERFECTLY CONSISTENT WITH THAT ANSWER.

This Court has already answered the question presented in this case in *First Options of Chicago v. Kaplan*, 514 U.S. 938, 943 (1995), where the Court held that "[t]he arbitrability of the merits of a dispute depends on whether the parties agreed to arbitrate that dispute . . . arbitration is simply a matter of contract between the parties." *See also McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.*, 858 F.2d 825, 831 (2d Cir. 1988) ("[t]he purpose of the Federal Arbitration Act was to make arbitration agreements as enforceable as other contracts, *but not more so*") (emphasis in original).

In the proceeding below, the district court concluded that Unisys and CS had no agreement to arbitrate, and that there was "no principal/agent relationship" entitling Unisys to be treated as a party to the arbitration clauses that appeared in two English law contracts entered into between CS and a European affiliate of Unisys. *See* Appendix to Petition at 9a (district court opinion). Based on these conclusions of fact and law, the district court denied the Petitioner's motion to compel arbitration, citing this Court's decision in *First Options v. Kaplan*, *supra*, and the Third Circuit's previous holding in *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287 (3d Cir. 1996) ("The opinions in *Kaplan* are the controlling precedent").

The Third Circuit affirmed in a brief judgment order, in which it adopted the district court's findings, because this case

involved a straightforward application of *First Options*. Although the Petition claims, at pages 14-15, that the Third Circuit should have applied what the Petitioner calls "the non-signatory doctrine articulated in *Pritzker* [*v. Merrill Lynch, Pierce, Fenner & Smith*, 7 F.3d 1110 (3d Cir. 1993)]," the author of the opinion in *Pritzker*, Third Circuit Judge Timothy K. Lewis, did not agree. This is clear because he joined in the issuance of the judgment order in this case, and specifically discussed this Court's decision in *First Options* during oral argument.

Inexplicably, the Petition does not address or even cite *First Options*, even though the Petitioner's brief to the Third Circuit discussed the case at length, and clearly recognized its applicability here. Instead, the Petition relies almost exclusively on cases that predate *First Options*, and are distinguishable from this case on their facts.

II.

THE COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH OPINIONS IN OTHER CIRCUITS.

The Petition argues that the Third Circuit's decision is somehow "in conflict" with the opinions in other circuits, but the cases it cites do not support this claim, and many are sharply distinguishable on their facts.

In *Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773 (2d Cir. 1995) (cited on page 10 of the Petition), for example, the Second Circuit refused to allow one party to an arbitration agreement to compel the nonsignatory parent of the other party to arbitrate, finding that on the facts presented, the nonsignatory parent "could not possibly be bound under an agency theory." *Id.* at 777. This is similar to what the district court found in this case, and certainly is not contrary to the Third Circuit's decision.

Similarly, in *Britton v. Co-Op Banking Group*, 4 F.3d 742 (9th Cir. 1993) (cited at pages 10-11 of the Petition), the Ninth Circuit refused to allow the nonsignatory purchaser of a company to enforce an arbitration clause contained in a contract previously entered into by that company with a third party, noting that:

> [t]he right to compel arbitration *stems from a contractual right* . . . That contractual right may not be invoked by one who is not a party to the agreement and does not otherwise possess the right to compel arbitration.

Britton, 4 F.3d at 744 (emphasis added). *See also McCarthy v. Azure*, 22 F.3d 351 (1st Cir. 1994) (cited at page 10 of the Petition) (affirming denial of a motion to compel arbitration, and noting that "a party seeking to substitute an arbitral forum must show . . . that the protagonists have agreed to arbitrate").

Other cases cited in the Petition are simply inapplicable here, because they involve completely different facts. In *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753 (11th Cir. 1993), *reh'g, en banc, denied, cert. denied sub nom Sunkist Growers v. Del Monte Corp.*, 513 U.S. 869 (1994) (cited throughout at pages 10-15 of the Petition), for example, the nonsignatory that the court held was entitled to invoke the arbitration clause was a successor-in-interest to the party that had signed the arbitration agreement, having purchased that company, absorbed its operations, and directly inherited its rights and obligations:

> Upon acquiring ownership of SSD, Del Monte ceased operating it as an independent enterprise and absorbed it into Del Monte's own internal soft drink division. *For all practical purposes, SSD lost its independent operating status and became a part of Del Monte.*

Id. at 758 (emphasis added). This was clearly not the situation in this case. Moreover, attempts to stretch *Sunkist* beyond its facts, even in the Eleventh Circuit where it was decided, have proven unavailing, as recent discussion of *Sunkist* by an Eleventh Circuit district court makes clear:

> Persuasive authority . . . supports the conclusion that a district court is not required to compel arbitration between parties who have not agreed to such arbitration. . . .
>
> The holding in *Sunkist* does not require a contrary conclusion. As plaintiffs point out, the *Sunkist* court emphasized that upon acquiring Sunkist Soft Drinks, Inc. ("SSD") from Sunkist Growers, Inc., *the Del Monte Corporation absorbed SSD's operations* into Del Monte's own soft drink division *and effectively succeeded to SSD's express contractual right to arbitrate any disputes against it.*

Collins v. International Dairy Queen, Inc., 169 F.R.D. 690, 693 (M.D. Ga. 1997) (emphasis added). In this case, there was no suggestion that Unisys had ever "absorbed", or "succeeded to the rights of", the European entities whose arbitration clauses it sought to invoke. For this reason, *Sunkist* is not applicable here.

Similarly, the Petition cites, at pages 10-12, 15, the nine-year old pre-*First Options* decision in *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315 (4th Cir. 1988). In *J.J. Ryan*, however, the plaintiff had sued a parent corporation and its subsidiaries after the parent threatened to terminate certain contracts, containing arbitration clauses, that the plaintiff had entered into with the subsidiaries. 863 F.2d at 318. In this case, by contrast, the claims against Unisys allege independent acts of fraud, regardless of whether any affiliate of Unisys

breached an agreement. Thus, *J.J. Ryan* would not be applicable here even if it had been decided after *First Options*.

Among other non-controlling cases, the Petition (at pages 10, 12) cites *In re Oil Spill by the "Amoco Cadiz"*, 659 F.2d 789 (7th Cir. 1981). *Amoco Cadiz* is completely distinguishable from this case, however, because there, the plaintiff/nonsignatory (who was trying to avoid arbitration) was taking inconsistent positions in the litigation on the issue of *its* agency relationship to the signatory:

> *By its own allegations*, [the nonsignatory's] stake in the controversy is as [the signatory's] agent. *Having alleged an agency relationship as a basis for its standing in the suit*, it cannot slough off that relationship at will. It would advance neither judicial economy nor the purposes of the federal arbitration act to permit [the nonsignatory] to assert in a judicial forum claims grounded upon its alleged relationship to [the signatory] and to allow it to disavow the relationship for purposes of the arbitration . . .

659 F.2d at 796 (emphasis added). In this case, by contrast, CS has not alleged that it is an "agent" of anyone that has an arbitration agreement with Unisys. *Amoco Cadiz* is thus irrelevant to this case.

Other cases cited by Unisys also differ markedly on their facts from the instant case. *See Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir. 1990) (officers and directors of corporation that signed arbitration clause could compel arbitration in their capacity as agents of corporation); *Goodwin v. Ford Motor Credit Co.*, 970 F. Supp. 1007 (M.D. Ala. 1997) (nonsignatory party seeking to enforce arbitration clause was assignee of all signatory's rights under the contract containing the arbitration

clause); *Gulf Guaranty Life Ins. Co. v. Connecticut Gen. Life Ins. Co.*, 957 F. Supp. 839 (S.D. Miss. 1997) (plaintiff specifically alleged agency relationship between signatory and nonsignatory corporate affiliates); *Chase v. Check*, 158 F.R.D. 59 (E.D. Pa. 1994) (defendants were all signatories or agents of signatories). Thus, they provide no evidence of a "conflict" between the circuits on this issue.

III.

THE "EXTENSION" RULE ADVOCATED IN THE PETITION WOULD CREATE CHAOS IN ALL CASES WHERE ARBITRABILITY IS CONTESTED, AND IT WOULD NOT BE FAIR.

The Petition advocates the "extension" of arbitration agreements beyond the parties to those agreements, based on the alleged "involvement" of non-parties in the transactions at issue. Such a rule, however, would create a procedural nightmare in the district courts, which would have to determine, in each case where a non-party sought to compel arbitration, whether that non-party was sufficiently involved in the transactions at issue to justify "extending" the other parties' arbitration agreement to it.

Such an approach would also be fundamentally inconsistent with the intent of Congress in enacting the Federal Arbitration Act, which was to "make arbitration agreements as enforceable as other contracts, *but not more so*." *McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.*, 858 F.2d 825, 831 (2d Cir. 1988) (emphasis in original). It would also run directly contrary to this Court's holding in *First Options* that "the arbitrability of the merits of a dispute depends on whether the parties agreed to arbitrate that dispute . . . arbitration is simply a matter of contract between the parties." 514 U.S. at 943.

The "extension" rule advocated in the Petition would also be extremely unfair, because it would allow parties to compel arbitration where they themselves had never agreed to arbitrate. This would violate the basic contract principle of "mutuality of obligation," which is at the heart of contract formation. The Third Circuit recognized this problem in *Dayhoff*, *supra*, where, in determining that the defendant Hershey could not compel arbitration based on agreements to which it was not a party, the court of appeals explained:

> Of course we recognize that [plaintiff] Dayhoff did agree to the arbitration . . . clause. However, we find appellee's [defendant Hershey's] position [that it should be able to compel arbitration of claims against it based on agreements to which it was not a party] unacceptable, in that under it Hershey (as well as other nonsignatories to the agreement) has the option to accept or reject the arbitration . . . clauses, whereas Dayhoff . . . is compelled to accede to Hershey's wishes. *The very fact that Hershey would have such a choice belies the existence of an agreement [to arbitrate] between Dayhoff and Hershey.*

Dayhoff, 86 F.2d at 1294, 1296-97 (emphasis added). The same situation is presented here.

In this case, the Petitioner clearly had the right to avoid arbitration at any time simply by pointing out that: (1) its European affiliate BV is organized as a separate company that it does not own directly (which is apparently true); (2) it was *not* a party to any of BV's contracts with the plaintiff (which is true); (3) it never agreed to arbitrate anything with CS (which is true); and (4) its intent *not* to arbitrate anything was evidenced by the language in its English law guarantee of one of BV's contracts with CS, which specifically stated that disputes as to

its guarantee obligations would be resolved *judicially*, not in arbitration.

Despite being insulated in this way from any obligation to arbitrate, the Petitioner argues that it should nevertheless be allowed to compel arbitration of the claims asserted against it in the district court now simply because it wishes to do so. A party cannot "have it both ways," however — *i.e.*, refuse to agree to arbitration itself, and yet still reserve the right to "become involved" in the transactions in issue, and thereafter compel arbitration of any claims against it arising out of those transactions by invoking the arbitration agreements of other parties. This would not be fair, and it certainly would not enhance the "certainty" of dispute resolution mechanisms — because no one would ever be able to predict who the parties to an arbitration might be.

IV.

THE THIRD CIRCUIT'S DECISION DOES NOT IN ANY WAY "UNDERMINE PREDICTABILITY IN INTERNATIONAL BUSINESS TRANSACTIONS".

The Petitioner argues that this Court should extend to corporate parents the arbitration provisions in their subsidiaries' contracts with third parties in order to add "predictability" to the forum selection process, and as a prophylactic measure against what it characterizes as "the 'end around' the arbitration clause effected by CS here." Petition at 18. What this argument ignores, however, is that in this case, the Petitioner took its own steps to ensure "predictability" by carefully insulating itself from any obligation to arbitrate with CS.

First, Unisys avoided becoming a party to *any* of the European contracts that CS entered into with the European

companies that were working on the CS project. Second, when it issued a guarantee of one of those contracts, it carefully avoided agreeing to arbitrate *any* disputes with CS, and expressly provided that any disputes with CS as to its guarantee obligations under the governing English law would be decided in *court*. Third, it did not enter into any agreements with CS as to how or where any other claims against it would be adjudicated. Fourth, it carefully maintained its position as an entity separate and apart from the European companies with which CS contracted — even admitting, in its brief on this appeal, that CS's action in the court below is "against an entity with which it did not contract." Petition at 9.

Having carefully distinguished itself in this manner from the European entities with which CS contracted, the Petitioner should not now be able to insist that it be governed by the terms of their contracts, particularly where it could have successfully resisted any such demand if CS had made it. Unisys chose to insulate itself from any contractual obligation to arbitrate with CS. It cannot now demand that this Court reverse the effect of that decision in order to enhance "competitive business practice," or to reduce what it claims will otherwise be a "chill" in "international business relationships." *Id.* at 18-19.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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